No. 2967

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In the United States Circuit Court of Appeals

for the Ninth Circuit

NATIONAL SURETY COMPANY, a corporation,
Plaintiff in Error,

vs.

ISAAC BLUMAUER, W. DEAN HAYS and ORA J. HAYS, his wife; T. F. MENTZER and ELIZABETH E. MENTZER, his wife; A. D. CAMPBELL and JESSIE E. CAMPBELL, his wife; DAVID COPPING and EVA COPPING, his wife, Defendants in Error.

Reply Brief of Plaintiff in Error

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Metropolitan Press, Seattle

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REPLY BRIEF OF PLAINTIFF IN ERROR.

We desire to submit the following observations in replying to the brief of defendants in error:

Counsel for defendants in error raises the question of our not having pleaded estoppel and that objection is raised as such for the first time in this case in their brief. Our answer to that proposition is twofold:

First: The letters offered in evidence are not srtictly for estoppel, and it is our view that an estoppel as such is not in issue.

The question is one of construing the indemnity

agreement

~~in error~~. In considering this question the Court will consider the language of the agreement, the purpose to be accomplished, and the meaning placed upon it by the parties.

These letters are essential to show not only the purpose to be accomplished but also the meaning, understanding and situation of the parties. This is certainly permissible, as will be seen by reference to the cases cited in *Barnes vs. Barrow,* 61 N. Y. 39, cited by the defendants in error.

Second: The matter of pleading was not presented to the Trial Court. No such objection was brought to the attention of the Trial Court by the defendants in error, and therefore was waived and cannot now for the first time be urged in this court.

When the evidence complained of was offered, the objection interposed was that it was immaterial and irrelevant; not that a plea of estoppel had not been interposed, or that as the pleading stood, such evidence was not admissible. If such an objection had been made and sustained, plaintiff in error would have had an opportunity to amend, and if amendment should have been refused could have moved for a voluntary dismissal. The Trial Court admitted the evidence and there was no claim of surprise or that the pleadings did not

justify the proof, but the case was tried on the assumption by all that the pleadings were sufficient.

McDonnell v. DeSoto Sav. Bldg. Assn., 75 S. W. 438.

On page 27 of defendant's brief, it is stated that the indemnity agreement was acknowledged only by Blumauer. This is incorrect. It was acknowledged by all of the indemnitors and they were all parties to it. (Record p. 20 and p. 103.)

On the same page it is said with reference to the bond "covering deposits of *said* treasurer." The personnel of the treasurer is not mentioned in the indemnity agreement and "said treasurer" has reference as the indemnity agreement will show, to the "Treasurer of Thurston County." (Defendants' brief, p. 8.)

On page 29 it is said that the defendants "contracted for accommodation only." We believe we have shown this to be incorrect in our original brief.

These indemnitors recited in their agreement that they have requested the plaintiff in error to execute the bond, and that plaintiff in error has executed it upon consideration of their executing the indemnity agreement; they acknowledge receipt of one dollar as the money consideration and agree to pay plaintiff in error an annual premium of twenty-five dollars as com-

pensation "for the accommodation afforded the undersigned by the execution of said instrument by the Company."

They were the officers of the bank, conducted its business and comprised its Board of Directors, and owned all but 12 shares of its capital stock, and the execution of the bond was for their direct benefit, and for the purpose of enhancing their personal riches. They were certainly not volunteers or accommodation sureties, but compensated ones.

On page 32 of the brief of the defendants in error it is suggested that there would be a difference in guaranteeing the financial condition of their bank if Marr controlled the deposits of the county moneys, and if Britt did so.

We cannot reason this out. They were in fact guaranteeing against themselves as they were in entire control in conducting and operating the bank. Their liability was limited to $5000. They were in control of the situation, no matter what treasurer would make deposits. They could stop the deposits at any time and could at any time cease to become a depository of county moneys. They were in a position much better than Marr or Britt to know the financial condition of their bank, and it was to their inter-

ests, and not the interest of Marr or Britt, who would be protected in any event by the surety bond, to see that deposits were not accepted if the financial condition of the bank did not warrant. We are unable to see what difference the personnel of the County Treasurer made.

As we read the authorities cited on this subject, they are not applicable to a situation of this kind. They do not involve the guarantee of one's own business, which primarily is to result in one's financial gain.

Counsel misconstrues the real purpose of our reference to *U. S. v. Bailey,* 178 Fed. 302, and *American Surety Company v. Campbell,* 138 Fed. 531. Our effort was to show that the real purpose of the transaction should control.

On page 53 it is suggested that the other defendants would not be bound by the request for a substitute bond made by Hays and Blumauer, but we submit their agreement, which recites the contrary. (See Sec. 8 of Indemnity Agreement, ~~Appellant~~ Defendants's Brief, p. 14.)

It is also suggested that we are attempting to confound the rights of Mentzer, Campbell and Copping with those of Blumauer and Hays. This is not our

intention. Mentzer was Director and Vice-President, and Campbell a Director and Assistant Cashier. The application for the substitute bond was authorized by the Board of Directors. (Record p. 136.) The judgment is in favor of all the defendants. It dismisses the action as to all and awards costs to all, and all appear as defendants in error by their attorneys (Record p. 50). (~~Appellant's~~ Defendants' brief title page, and signatures on page 56.)

On page 54 it is stated as a fact that defendant in error Mentzer resigned prior to the substitute bond. The records of the bank do not show that such resignation was accepted, however. There is not even such a claim made on behalf of defendant in error Campbell.

As to defendant in error Mentzer, defendants, as a part of the cross-examination of plaintiff's witness Langley, identified by him and offered in evidence defendants' Exhibits E and F, which were, we think, clearly inadmissible as not cross-examination but a part of defendants' defense, and our objection on that ground should have been sustained. (Record p. 73) (Assignment of Error Record p. 140).

Exhibit "E" (Record p. 137) is a letter dated March 8th, 1913, from Mentzer to President Blu-

mauer, tendering his resignation as *Director* and requesting that it be submitted to the Board at its next meeting. It was clearly not proper cross-examination.

Exhibit "F" (Record p. 138) is a letter dated the same date from Mentzer to President Blumauer, enclosing Exhibit "E." He closes the letter with the following statement: "The bank ought to be organized with new blood and new capital. I am willing to step down and out as I do not think I am adding any strength to it at the present time."

The evidence contains a statement of all the meetings of the Directors from January 10th, 1911, to the close of the bank. They show that Mentzer was Director and Vice-President and Campbell Director and Assistant Cashier, and no minutes recorded any resignation. (Record pp. 71-72.) These letters tendering Mentzer's resignation do not purport to be a resignation for the office of vice president nor does it appear that his tendered resignation from the Board was ever accepted.

On page 54 two cases are cited to the effect that the clause in the agreement that the indemnitors would at all times keep plaintiff in error indemnified (Second par. ~~Appellant's~~ Defendants' Brief, p. 10), and that they will continue liable until there shall have been furnished

plaintiff at its New York Office proof of release (~~Appellant's~~ Defendants Brief, bottom of page 9), and that the agreement binds them and their heirs until plaintiff in error shall execute a release under its corporate seal and signature of its officers (~~Appellant's~~ Defendants Brief, p. 14), is contrary to public policy.

The two cases cited do not so hold, but do hold that a stipulation that vouchers received by plaintiff in settling its liability shall be *conclusive* proof of such liability against these indemnitors, is void as against public policy. But if the stipulation only made such vouchers prima facie evidence, then it would be valid.

However, this latter doctrine is denied and the stronger contrary doctrine laid down in,

American Bonding Co. v. Alcatraz Const. Co., 202 Fed. Rep. 483;

Ill. Surety Co. v. Maguire, 145 N. W. 768;

Guaranty Co. of North America v. Pitts, 30 So. 758.

After all is said, the question to determine is, was the indemnity agreement in force when the bank failed? What was the purpose to be accomplished and what the intention of the parties, and their situation?

There is no complaint of the first year's extension which carried the bond and the indemnity agreement

over into Britt's term, to June 22nd, 1913. At that time the bond was the same as though Britt were the treasurer named in it. He had been making deposits under the protection of this bond for five months, and the defendants in error had received such deposits knowing no new bond had been given, and that their indemnity agreement had not been released, but was still held by plaintiff in error.

When this year expired, acting through Hays, the bank paid the premium and extended the bond for another year, and gave the receipt showing that fact to Treasurer Britt, and he continued to deposit county moneys, and the bank, controlled by defendants in error, continued to receive the same all under the protection of this bond with the indemnity agreement unreleased, but still held by the plaintiff in error, the defendants in error having agreed to keep the plaintiff in error at all times indemnified.

Now at the end of the third year, the same procedure was contemplated, the premium paid through Hays, and receipt continuing the bond for another year was filed with Treasurer Britt. But then after some correspondence, it was determined to *substitute* a new bond for the old one, this procedure is all in conformity with the indemnity agreement as may be

seen by its reading. The substituted bond was in effect the same as though the old bond had been continued by the receipt as it had been theretofore.

The purpose was to make and keep defendants' bank a depository of county moneys to be deposited by whoever might be treasurer, and to protect plaintiff in error from loss by reason of such deposits.

We submit that the plaintiff in error ~~had~~ made a case to be submitted to the jury, and the judgment of the Trial Court should be reversed and in any event, a new trial granted.

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